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WEE KOK BIN

v.

ASEAMBANKERS MALAYSIA BHD

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HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[SUIT NO: D2-22-962-2005]
9 MAY 2012

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CIVIL PROCEDURE: *Pleadings - Fraud - General allegation of fraud - Whether insufficient - Whether fraud specifically pleaded with particulars - Whether plaintiff failed to prove defendant conspired to depress share price or breached any securities laws - Whether plaintiff's suspension and subsequent termination as remisier properly effected - Rules of the High Court 1980, O. 18 r. 8(1) & (2)*

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The plaintiff in this case was a former remisier of the defendant. The two main issues that arose herein were: (i) whether the plaintiff was lawfully suspended from trading, and subsequently terminated, as the defendant's remisier under a Standard Remisiers' Agreement ('SRA') executed by the parties; and (ii) whether the plaintiff remained liable to indemnify the defendant for losses sustained by his clients in respect of share dealings conducted by him on their behalf. Having observed the plaintiff's high exposure to a certain share ('the Liqua shares'), the defendant imposed a buying limit of RM70 million on the Liqua shares. When the plaintiff exceeded that limit, he was suspended from purchasing the Liqua shares. Several hours after the buy-suspension, 3,000 lots of the Liqua shares were dumped on the open market as a single sell-order causing the share's price to drop severely. This prompted the defendant to totally suspend the plaintiff from trading in the Liqua shares the next day but the share price continued to plummet resulting in a huge volume of the Liqua shares being traded at depressed prices. Certain 'married deals' involving the Liqua shares also took place allegedly with the defendant's approval. The plaintiff alleged his suspension from trading in the Liqua shares were *mala fide* and calculated to create a sell-down of the Liqua shares with the object of depressing the share's price for the benefit of the defendant and others acting in concert with it. The plaintiff claimed that the sell-downs would not have occurred if he had not been suspended. Accordingly, it was his contention that he was not responsible for the losses his clients may have sustained in their dealings in the Liqua shares by reason

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of his suspension and he was not liable to indemnify the defendant for such losses. In the instant suit, the plaintiff claimed for, *inter alia*, (i) compensation and/or damages arising from the defendant's alleged breach of the SRA and for unlawfully terminating him as its remisier; (ii) payments of commissions due to him and the refund of his security deposit; (iii) loss of earnings following his suspension and termination; and (iv) an order that the defendant indemnify him for all losses sustained by his clients in respect of their dealings in the Liqua shares by reason of his suspension. The defendant counterclaimed for payment of the debts incurred by the plaintiff's clients in respect of their trading in non-Liqua shares. In light of this, the defendant's claimed (i) a declaration that the plaintiff's termination was lawful and valid; and (ii) that the defendant be entitled to use the commissions and security deposit payable to the plaintiff to set off the amounts owed by his clients.

Held (dismissing plaintiff's claim with costs; allowing defendant's counterclaim with costs):

(1) The allegations of conspiracy (in the context of an alleged acting in concert to depress the share price of Liqua, which was essentially a case grounded on fraudulent conduct in the context of the securities laws) had not been properly taken in the plaintiff's pleadings. No full particulars were given in the statement of claim. This ran counter to the express provisions of O. 18 r. 8(1) and (2) of the Rules of the High Court 1980. Fraud had to be specifically pleaded with particulars and a general allegation was insufficient. (para 32)

(2) On the evidence, the plaintiff's allegation that the defendant had fictitiously created an element of exposure and used that as a ground to suspend him was not borne out. Similarly, the plaintiff had not proven that the defendant had through its directors and/or employees breached any of the securities laws, exchange rules, Rules of MCD or Rules of the Clearing House. (para 33)

(3) So long as a remisier was given reasonable notice of any restrictions imposed on his trading, the decision taken by the stockbroking company was lawful under the contract. The plaintiff's claim of unlawful suspension and termination due to the absence of prior written notice and without lawful justification, should be dismissed. (paras 38 & 40)

A **(4)** On the facts and the law, the plaintiff's termination was effected properly under the SRA and in accordance with the notice requirement. (para 42)

Case(s) referred to:

B *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA* ***(refd)***

Anjali Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Browne v. Dunn [1893] 6 R 67 HL ***(refd)***

Sime Securities Sendirian Berhad v. Wong Kok Wah [200] 1 LNS 358 HC ***(refd)***

C *Superintendent of Lands and Surveys, Bintulu & Anor v. Agi Bungkong & Ors [2012] 6 CLJ 823 CA* ***(refd)***

Tan Leng Choo v. Eoh Kim Hong [2008] 1 LNS 568 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Wong Swee Chin v PP [1980] 1 LNS 138 FC ***(refd)***

D *Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC* ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 rr. 8(1), (2), O. 78

Securities Industry Act 1983, ss. 2(1), 84(2), 85, 87A

E *For the plaintiff - Rovert Devan (Komathi Kaliappan & Rasvinder Kaur Sodhi with him); M/s Robert Devan & Co*

For the defendant - Sunther Thulasi (Nurashikin Mansoor with him) M/s Affendi Zahari

F *Reported by Ashok Kumar*

JUDGMENT

G **Mohamad Ariff Yusof J:**

Introduction

[1] The plaintiff in this case is a former Remisier of the defendant, previously known as Mayban Securities Sdn Bhd, and H now as Aseambankers Malaysia Berhad. The full trial itself has been long and extended, with 12 witnesses called for the plaintiff and six for the defendant. The plaintiff himself gave evidence as PW12. Nevertheless, two main issues can be identified on the facts of this case. First, whether the plaintiff was lawfully I suspended from trading and subsequently terminated as the defendant's Remisier or commissioned dealer's representative under

a Standard Remisiers' Agreement ("SRA") executed by the parties, and secondly, whether the plaintiff remains liable to indemnify the defendant for the remaining losses sustained by his clients in respect of share dealings conducted by him on their behalf. The issue of indemnity is also covered by the defendant's counterclaim.

The Plaintiff's Prayers For Relief

[2] The details of the claims are comprehensively spelt out in the plaintiff's amended statement of claim and the defendant's counterclaim. As for the plaintiff's claims, the reliefs prayed are:

(a) Compensation and/or damages arising from the defendant's alleged breach of the SRA and the defendant's unlawful termination of the plaintiff's service as its Remisier;

(b) Payment of the sums of RM510,000 and RM32,808.90 being overdue commissions under a special incentive scheme earned by the plaintiff from July to September 2004 and October 2004 respectively;

(c) Damages in respect of libel/defamation resulting from the alleged unlawful suspension and termination;

(d) Exemplary damages for the alleged unlawful suspension and termination;

(e) Loss of earnings and consequential loss from October 2004 and continuing resulting from the unlawful suspension and termination and the loss of the plaintiff's dealer's representative licence due to the termination;

(f) Refund of the plaintiff's security deposit of RM1,775,826.90;

(g) An order that the defendant "do indemnify and pay to the plaintiff all losses and consequential loss incurred and/or sustained by the several direct clients of the plaintiff in respect of any dealing in/or omission to deal in Liqua shares by reason of the unlawful suspension of the plaintiff by the defendant, such losses "arising from acts of the company directors and/or employees which directly or indirectly contravene or breach any of the Securities Laws, the Exchange Rules, Rules of MCD and Rules of the Clearing House" as provided under cl. 12.4.2 of the said agreement";

A (h) Interest on all outstanding sums and damages at 8% per annum;

(i) Costs.

The Counterclaim

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[3] The defendant's counterclaim is based principally on the indemnity clause in the SRA (cl. 6.1), and on this basis the defendant claims for the outstanding debts of the Remisier's clients in respect of margin accounts and non-margin accounts. The C figures as at 17 September 2001 are a total of RM6,180,447.49 for losses under the margin accounts and RM453,131.65 for losses under the non-margin accounts. See para. 33 of the amended defence and counterclaim. Further to these claims, the defendant also claims:

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(a) A declaration that the plaintiff's termination as a Remisier by the defendant is lawful and valid.

(b) A declaration that the defendant has lawfully withheld the plaintiff's commission and security deposit by reason of the E indebtedness caused by the plaintiff's clients.

(c) In the alternative, an order that the defendant may utilise the plaintiff's commission and security deposit to set off the outstanding debts of his clients.

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(d) Costs.

The Background Facts

[4] The facts of this dispute between the parties, as distilled G from the testimony of witnesses and the documentary evidence, can be summarised as follows. The plaintiff was one of the top-performing remisiers in the defendant company until certain share trading events occurred which led to his suspension and subsequent termination as a remisier. These events centred on H share dealings in Liqua shares by the plaintiff on behalf of his numerous clients which resulted in a high exposure borne by the defendant. At the centre of this dispute are the share dealings in Liqua shares by the plaintiff's non-margin client by the name of Align Matrix Sdn Bhd.

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High Exposure To Liqua Shares And Alleged Limit Of RM70 Million

[5] According to the defendant, the company had been monitoring the plaintiff's high exposure to Liqua shares since August 2004. Events came to a head in the month of October 2004 when the plaintiff breached a RM70 million limit allegedly set by the defendant. There is some dispute on this, with the plaintiff disputing that he was informed beforehand of this RM70 million buying limit as a matter of company policy and directive. In any event, on 5 October 2004, the plaintiff's outstanding purchase was RM79,322,748.32, on 6 October 2004 and on 7 October 2004 his outstanding purchase in Liqua shares ballooned to RM83,206,948.63 and RM88,512,179.89 respectively.

The Buy Suspension And Total Suspension On 7 October 2004 And 8 October 2004

[6] When his outstanding purchase increased to RM83,206,948.63 at the close of the trading day on 6 October 2004, the management of the defendant decided to buy suspend the plaintiff on the morning of 7 October 2004. This was a buy-suspension and related only to dealing in Liqua shares. It appeared that the plaintiff appealed and was allowed to buy up to 50% of the shares being sold by his clients through four of his clients accounts. The Investigation Report produced by the investigating auditors of the defendant explains the events unfolding on that day as follows:

> 7.0 Findings of the Trading of Liqua Shares.
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> 7.7
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> (ii) Puan Ida Zafrina Azizul Hasan (Ida), Executive of CCD, said that she was instructed by Azham on 7.10.2004 to only allow Wee to buy back 50% against any sales of Liqua shares for the 11 clients on that day. Ida said that that about 11 a.m. Azham had ecceded to Wee's requests for additional buying limit. However, at about 3 p.m. Azham had given instruction to suspend purchases of Liqua shares for weeks 11 non-margin client.
>
> (iii) When queried on why he had changed his mind Azham said "I don't trust him anymore and his ability to reduce the outstanding as required as we do not want the outstanding to be higher and jeopardise the company's overall position."

See Investigation Report 2004/78 exh. as P72.

The "Slam Down" And "Limits Down" On Liqua Share Trading

[7] Thereafter at 4.15pm what has been described as a "slam down" occurred whereby 3000 lots of Liqua shares were dumped on the open market as a single sell order. Liqua shares were trading at RM2.32 by late afternoon but after the "slam down", the counter hit "limit down" to close at RM1.62. The defendant then totally suspended the plaintiff from trading in Liqua shares the next day ie, on 8 October 2004. The share price of Liqua shares went "limit down" for the second time in the morning when the share price decreased from RM1.62 to RM1.14 and at the close of trading the share price had dropped to RM0.925. On 8 October 2004 approximately 60 million Liqua shares were sold within the abovesaid price range.

Backdated Notice Of Suspension

[8] The buy-suspension was communicated verbally to the plaintiff and it was only on 27 October 2004 that the plaintiff received a letter dated 22 October 2004 notifying him in writing of the suspension which was backdated to 8 October 2004. This was a delay of 19 days from the date of his suspension.

The "Married Deals"

[9] Two important events occurred in the interim. They related to two "married deals" (or direct business transactions) involving a total of 13.44 million Liqua shares done at RM0.965 per share. The first married deal was for 4 million shares with a trade value of RM3.86 million; the second was for 9.44 million shares with a trade value of RM9,109,600. Both married deals related to shares owned by the plaintiff's client Align Matrix Sdn Bhd. These shares were Align Matrix's collateral to support its unpaid outstanding balance.

[10] The circumstances surrounding the transactions were suspicious. They were approved by the defendant's CEO, Hamzah Mahmood ("Hamzah") ("DW6"), and the purchasers did not have to pay for their purchases, since the Managing Director of Align Matrix, Goh Bak Ming (PW11) allegedly instructed that the proceeds of the sales be utilised to pay for these purchases. The

persons who purchased the shares were respectively the husband and two brothers-in-law of the remisier through whom these transactions were routed, namely Norizan Kadir. The plaintiff was kept out of the loop although Align Matrix was his client. Even Goh Bak Ming gave the impression during his testimony that he was unaware of the details. In sum total, when the deals were done, they had the effect of diverting the available collateral to support the high exposure in what has been described by the plaintiff as "self-financing transactions".

The Investigation Report

[11] The Investigation Report describes them as "highly irregular", but noted that they were however part of a "workout arrangement brokered by Maysec's CEO and a principal of Align Matrix for the purpose of securing a block of 42.9 million moratorium shares to cover the exposures of all the eleven non-margin accounts dealing with Liqua shares." (para. 8.10). The transactions were jointly approved by Hamzah and Azham, but even Hamzah failed to satisfactorily explain why the workout arrangement had to be done in such a convoluted manner.

[12] The investigation report noted however that Norizan's three clients had subsequently pledged back part of the shares to seven of the non-margin accounts, but this "pledging back" was short by 2,819,900 shares. The investigation report noted the reply given by Hamzah to them:

> 3.4 …
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> Hamzah's reply indicated that there may be other motives for Align Matrix to transfer the 13.44 million shares out of its account to Norizan's three accounts. However, we were unable to establish the motives …
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> The "recovery strategy/workout arrangement" was highly irregular …"

[13] The plaintiff has argued these suspicious circumstances resulted in prejudicing him in relation to the alleged high exposure and the outstanding balance of his clients, for which he was sought to be made accountable because of the indemnity provision in the SRA. It is to be noted further that although the evidence indicates the defendant was monitoring the alleged high exposure since August 2004, the defendant through Hamzah had authorised

an increase in the trading limits of nine clients on 8 October 2004 itself although these clients traded exclusively in Liqua shares. See para. 3.2 of the investigation report. The report formed a view Hamzah had not exercised "prudence" in this regard. This is of course denied by Hamzah in his testimony who said these clients had sufficient collateral to support the increase.

The Settlement Agreements

[14] The evidence discloses there were three settlement agreements which were entered with respect to the Align Matrix account and several other accounts of Liqua shares related accounts, such that presently these accounts have been fully settled and some amounts have been written off by the defendant. In short, the defendant has categorically stated that it is not claiming to be indemnified for the Align Matrix losses and the losses of the other accounts covered under the settlement agreements and the write offs.

See exhs. P23, P24 and P25 for the three agreements variously dated on 3 December 2004, 10 March 2005 and 6 March 2007.

[15] The Align Matrix losses were written off after the sale of collateralised shares. The amount written off was a hefty RM11,829,369.12. See exhs. D28, D91 and D92 for details of the outstanding balances and the mathematical workings to arrive at this figure of RM11,829,396.12.

Letter Of Termination Of 18 January 2005 And The Claim For Indemnity

[16] The backdated letter of suspension has been mentioned earlier. Thereafter, a letter dated 18 January 2005 was sent by the defendant to the plaintiff notifying him to settle the shortfall/ losses of his clients within one month, failing which his services as a remisier would be terminated under cl. 12 of the SRA. Since this letter provided for a one month's notice, the relevant clause has to be cl. 12.1 ("This agreement may be terminated by either party by giving the other no less than one (1) month prior notice in writing"). Appended to this letter were two "financial statements of shortfall" as at 5 January 2005. The first covered the position of non-margin clients, the second the position of margin clients. The shortfalls were respectively RM80,404,653.20 and

RM3,207,367.39. The current figures reflecting the shortfalls are now very much reduced and have been referred to earlier. Central to the defendant's claim is the indemnity provision, namely cl. 6 in the SRA. Given its importance, it is necessary to scrutinise very carefully what it says and how it governs the relationship between the remisier and the stockbroking company. The relevant cl. is 6.1 and it reads in its material parts:

> The Remisier hereby agrees to indemnify and keep indemnified the Company against all actions, claims, costs, expenses, losses and liabilities … whatsoever that may be suffered or incurred by the Company arising from or in connection with transactions in securities dealt by through the Remisier in the name of the Company save for losses arising from any wilful default, errors, negligence, instructions and any incorrect administrative procedures and accounting statements issued by the directors, officers and employees of the Company.

[17] This general indemnity provision has also to be read in relation to cl. 12.4 (which is consequential to the clause on termination by notice) which appears *per se* to be very general in its terms:

> 12.4 Notwithstanding the termination of this Agreement for any reason whatsoever:
>
> 12.4.1 The Remisier shall remain fully liable to the Company under this Agreement until all outstanding amounts due and payable hereunder has been fully recovered by the Company;
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> 12.4.2 The Company shall remain fully liable to the Remisier for losses arising from acts of the Company's directors and/or employees which directly or indirectly contravene or breach any of the Securities Laws, Exchange's Rules, Rules of MCD and rules of the Clearing House.

Legal Position Of Remisier

[18] The legal position under ordinary law of a remisier in the stockbroking industry has never been crystal clear. He is on the one hand the agent of his clients as well as the agent of the stockbroking company through which he trades on behalf of his clients. The "clients" are also for purposes of account opening and trading, similarly "clients" or customers of the stockbroking

company. Under the securities legislation, the remisier has to be a holder of a dealer's representative licence, the dealer being the stockbroking company (by definition "dealer"). The governing legislation at the time of this dispute was the Securities Industry Act 1983 ("SIA") and the regulations made thereunder. The definition of "dealer's representative" in s. 2(1) of the SIA provides some indicators as to the exact legal status of the remisier. The definition of "dealer's representative" means "a person, by whatever name described, who is in the employment of, or acting for or by arrangement with, a dealer, not being an exempt dealer, and performs for the dealer any of the functions of a dealer other than work ordinarily performed by accountants, clerks or cashiers." The reality of the economic relationship between the remisier and the dealer would place him within the broad definition of a person "acting for or by arrangement with" a dealer and "performs for the dealer any of the functions of a dealer". There is no statutory definition of "remisier" in any of the available legislation. To the credit of the securities industry, the remisier's legal position is now clarified contractually through the Standard Remisier's Agreement. It is now clear contractually that the remisier is a "Commissioned Dealer's Representative", and in this position he acts as "an agent of the company to trade in securities in the name of company". See preamble C of the SRA. "Clients" is expressly defined in the SRA as:

> All persons having an account/accounts with the Company under the codes allocated and assigned to the Remisier by the company whether or not recommended to the Remisier and/or personally known to him and duly accepted by both parties hereto. (See Clause 1.1)

Thus by this contractual definition, the remisier's "clients" are in effect the clients of the company itself. Reading the statutory and contractual definitions together, it cannot be a correct legal proposition that a remisier must be held strictly accountable for the trades done by the clients allocated and assigned to him just because they are in a broad sense "his" clients. Given the contractual relationship, as expressly detailed in the SRA, the indemnity provided by the remisier to the company cannot in law be conveniently founded on notions of strict liability. What in law is the extent of his liability to the company under the indemnity has to be determined in accordance with the contractual formula

agreed between the parties, and that, with respect, is to be found within the clear terms of cl. 6.1. The remisier is liable to indemnify the company against losses and liabilities if these losses arise from or in connection with transactions in securities "dealt by or through the remisier in the name of the company". There is however a large exclusion provision in that reads "save for losses arising from any wilful default, errors, negligence, instructions and any incorrect administrative procedures and accounting statements issued by the directors, officers and employees of the company". Putting it simply, if the losses are attributable to the acts of the company or its officers or employees, then the remisier cannot be held liable in law to indemnify the company. In this context too, the SRA spells out in detail the duties of the company to the remisier, which include the following (to be found in cl. 8.1.6):

> 8.1.6 take all relevant and reasonable action (legal or otherwise) against Client(s) for the recovery of the Indebtedness, within a reasonable period, which amounts so recovered shall be reimbursed to the Remisier in the event the Remisier's Security Deposit or any part thereof has been utilised to its satisfaction of the Indebtedness;

[19] Of relevance too is cl. 4.8 of the SRA reading:

> 4.8 The amount set-off against the Security Deposit shall be recorded and maintained separately from the books and records of the Clients' accounts so as to continue to facilitate the recovery of the amount set off from the Client(s).

[20] These contractual provisions are consonant with views expressed in case law such as in *Sime Securities Sendirian Berhad v. Wong Kok Wah* [200] 1 LNS 358; [2005] 4 MLJ 621:

> Under the indemnity clause in the agreement the Remisier shall indemnify the stockbroking firm. Such obligation is in consideration of the Plaintiff allowing the Defendant to introduce and have conduct of the accounts of its clients and thereby earning substantial commissions from the transactions conducted. I take a passage from the judgment of the Singapore Court of Appeal in *Associated Asian Securities Pte Ltd v. Lee Kam Wah* [1993] 1 SLR 585:
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> > … the contract was drawn up by the Appellants and was expressed in very stringent and comprehensive terms from the point of view of the Respondent, and the relevant terms providing an indemnity to the Appellant were expressed in very wide terms: the Respondent agreed to 'indemnify' (the

A Appellants) for any losses or damages arising from any contracts written or transaction entered into by the Respondent. The words are sufficiently wide to cover losses arising from any default of the Respondents' clients in honouring a *bona fide* and genuine transaction as well as losses arising from fraud or forgery by the Respondents' Clients." (at p. 634 of the Report, per Abdul Wahab Said Ahmad J).

[21] The issues relating to the validity or otherwise of the suspension and later, the termination of his service as remisier, are C also to be determined as a matter of contractual stipulation.

[22] As regards the buy-suspension and the total suspension, the plaintiff has argued there was no prior notice given, although there was a belated notice provided and served on him 19 days later.

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The Plaintiff's Pleaded Case

[23] It will be convenient at this juncture to analyse the plaintiff's pleaded case against the material facts outlined earlier.

E The plaintiff's case is first and foremost premised on the act of suspension of the plaintiff from trading in Liqua shares on 7 October 2004. It is alleged that the buy-suspension for the seven non-margin clients' accounts led to the "slam down" when Liqua shares were dumped on the open market as a single sell F order. This allegedly triggered the sell down, which led to the first limit down with a drop of 30% of the share price at the close of trading. The plaintiff avers that the defendant was "entirely responsible for creating such a volatile situation which should not have occurred but for the unprecedented wilful, malicious and G unlawful suspension of the plaintiff." (para. 5 of the statement of claim)

[24] It is further alleged that the second limit-down on the share price of Liqua shares on 8 October 2004 arose from the total suspension from trading of the plaintiff in Liqua shares for all his H clients accounts. This in turn was attributable to the defendant's unlawful suspension of the plaintiff commencing on 7 October 2004 (para. 6 of the statement of claim). Hence, "both suspensions on 7 October 2004 and 8 October 2004 were unprecedented, wilful, malicious and unlawful".

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[25] According to the plaintiff's pleaded case, the plaintiff had a positive Total Available Margin (TAM) of RM9.9 million to trade on 7 October 2004. The suspensions were therefore "imposed without just cause (*mala fide*) and were calculated to facilitate the creation of a sell-down of Liqua shares with the effect of triggering a precipitous drop in the share price of Liqua".

To quote paras. 8, 9 and 10 of the statement of claim:

> 8(e) The purported suspension is (on both occasions) of the Plaintiff were in breach of and contrary to Clause 7.1 of the said Standard Remisier's Agreement in that the Defendant failed to give to the Plaintiff formal notice in writing stating the reasons for the suspension thereby depriving the Plaintiff of a right to respond and in breach of natural justice; and
>
> (f) That only on 27th October 2004, long after the conspiracy shrouded two (2) unlawful Liqua shares transactions (the married deals ...) had been concluded, that Mr. Shim Choon Ming, Assistant Vice President, Head, Remisier Management Department, delivered to the Plaintiff the Defendant's letter dated 22nd October 2004 by which reference is made to the suspension of the Plaintiff, which suspension was backdated to 8th October 2004. The Plaintiff avers that the said notice of suspension was most extraordinary in that it was issued 19 days after the two (2) married deals had been successfully transacted during the period of suspension of the Plaintiff.
>
> 9) The Officers of the Defendant conspired and acted in concert, and in concert with others, during the said periods of suspension in order to manipulate and did so manipulate the share market for the benefit (and/or for the benefit of others acting in concert with them) so as to cause a sell-down of Liqua shares; and that for achieving the objective the Defendants officers suspended the Plaintiff (thereby shutting him out from the two (2) subsequent share transactions involving Liqua shares) prior to and before dealing (with the knowledge of the Plaintiff) unlawfully with Liqua shares ...
>
> 10) The Plaintiff avers that the Defendants Management were in breach of the securities laws (sections 84, 85 and 87A of the Securities Industry Act 1983 and Rule 401.1 of the Malaysia Securities Exchange Berhad (formerly the Kuala Lumpur Stock Exchange) as well as in breach of the Defendant's establish internal credit and trading policies) 11th October 2004 and 12th October 2004 by entering into private arrangements thereby

> artificially propping share price by using related parties which at the outset had no financial means to purchase shares; and thereby created a false or misleading appearance of active trading on the stock market or false or misleading appearance respect to the market for, or the price of, any such securities through the participation of the following officers of the first defendant …

[26] The plaintiff implicates the following officers of the defendant in the statement of claim:

(i) Hamzah Mahmood (the defendant's CEO);

(ii) Megat Joha bin Megat Abdul Rahman, Executive Director, Operations (EDO of the defendant);

(iii) Mohd Azaham bin Said, Vice President, Head of Credit Control of the defendant;

(iv) Shim Choon Ming, Assistant Vice President, Head of Remisier Management Department;

(v) Shahruddin Bhari, Assistant Vice President, Credit Control.

[27] In relation to the two married deals, it has already been noted that the plaintiff mentions Goh Bak Ming, the Managing Director and Controlling Shareholder of Align Matrix, as a person from whom the letters of instruction to carry out the married deals were procured by Hamzah Mahmood.

[28] Against these pleaded facts, the plaintiff avers that he is not responsible for the losses in his clients' accounts and should not be held accountable to indemnify the defendant for these losses since the losses arose "from wilful default, errors, negligent instructions committed by directors, officers and employees of the defendant". In para. 17 of the statement of claim, the plaintiff avers:

> 17) The Plaintiff avers he is neither indebted to nor liable to indemnify the Defendant on the sum of RM21,612,029 or any other sum or at all. The Plaintiff avers the said purported indebtedness liability is the debt due from the directors, officers and employees of the Defendant as "losses arising from acts of Company's directors and/or employees which directly or indirectly contravene or breach any of the Securities Laws, Exchanges Rules, Rules of MCD and Rules of Clearing House" pursuant to Clause 12.4.2 of (the SRA)

[29] It should be observed that on the plaintiff's pleaded case no mention is expressly made in relation to the increase in the trading limits of nine clients referred to in the investigation report. Counsel for the defendant has urged upon this court not to decide on this aspect of the plaintiff's case since it has not been pleaded, citing cases such as *Anjali Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22 (Federal Court), *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 (Supreme Court) and the more recent decision of the Court of Appeal in *Tan Leng Choo v. Eoh Kim Hong* [2008] 1 LNS 568 (Civil Appeal No. P-02-841-04) in support. I reproduce the some of the passages cited below:

(a) *Anjalai Ammal*, supra.

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to Order 19, rule 7A of the Rules of the Supreme Court. At p. 31 of *Halsbury* (3rd ed.) Vol. 3, the learned commentator has this to say:

> A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.

In *Thomson v. Birkley* [1883] 13 App Cas 793 Watkin Williams J. says:

> The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues.

In *Spedding v. Fitzpatrick* [1888] 38 ChD 410 at 413 Cotton L.J. says:

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.

In *Thorp v. Holdsworth* [1876] ChD 637 at 639 Jessel M.R. says:

> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to

A definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

Finally, in *Yorkshire Provident Life Assurance Co v. Gilbert & Rivington* [1895] 2 QB 114 at 152 Lindley L.J. says:

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> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars – of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.
>
> Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the Appellants were not obliged to call evidence to rebut. (per Maclntyre F.J at p. 25)

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(b) *Yew Wan Leong v. Lai Kok Chye*, *supra*.

Mr. Subramaniam, counsel for the Appellant, pointed out that the learned judge had decided on an issue which was not reflected in the pleadings or the submissions of the parties. He stressed that the substitution of a new contract under s 63 of the Contracts Act 1950 was never an issue between the parties and referred to the written submission of defence in the court below in which Mr. D' Cruz, counsel for the Defendant, had asked the court to rely on the written agreement in this case. Counsel also pointed out that the Defendant had pleaded that there was no waiver of the original agreement and had not pleaded any oral agreement, which he urged the court to ignore, as neither side had pleaded a new contract. The learned judge had therefore erred in holding that there was a new substituted contract, and reference was made to *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of courts to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned judge in that case in which His Lordship stated:

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> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise

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the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

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Counsel also referred to *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1987] 1 MLJ 393 at p. 395 in which case this court had also referred to *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 and considered that Sharma J had rightly held that the trial of a suit should be confined to the pleas on which the parties are at variance …

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We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 in which Mohamed Azmi SCJ stated at p. 418 that:

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Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:

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> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

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As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the Plaintiff's claim set aside … (at pp. 333-334 of the Report, per Gunn Chit Tuan SJC)

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[30] See also the majority judgment in the more recent case of *Superintendent of Lands and Surveys, Bintulu & Anor v. Agi Bungkong & Ors* [2012] 6 CLJ 823; [2012] 1 MLJ 335:

> The next common ground of appeal is on the pleading. It is the Respondents' pleaded case that the land in the provisional lease cover their native customary land or include a substantial part of their native customary lands as in map 'M'. It is trite law that parties are bound by their own pleading (*Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd* [1981] 2 MLJ 23, *State Government of Perak v. Muniandy* [1986] 1 MLJ 490). Pleading is not evidence. Order 18 r 7 of the Rules of the High Court 1980 states that facts, and only facts that must be pleaded but not the evidence by which these facts are to be proved (*Dowman*'s case (1586) Co Rep 7b, Moo KB 191; *North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 422). Thus, what is alleged and not admitted needs to be proved.
>
> The importance of pleading cannot be taken lightly. *In Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; [1989] 1 CLJ Rep 116 the Supreme Court (as it then was), said:
>
> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:
> >
> > > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is …
>
> In *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330 Gun Chit Tuan SCJ, in delivering the judgment of the then Supreme Court endorsed what Sharma J in *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 said on the function of pleadings:
>
> > In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. (at pp. 348 - 349 of the report)

[31] I have quoted these statements of the law in some detail because the principles of pleadings have become very relevant in this dispute, as will become apparent below in this court's evaluation of the law and the evidence.

Evaluation Of The Law And The Evidence

[32] As indicated at the outset of this judgment, a total of 18 witnesses have been called. Some conflict in testimonial evidence is only to be expected, and I have therefore given particular attention to the principles set out by the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 and *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639. As stated in the first case (*Tindok Besar*), judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case, and that plausibility should never be mistaken for veracity. The principles in *Aik Ming (M) Sdn Bhd* in turn are particularly relevant in the context of the allegation of "conspiracy" on the part of the defendant, its directors, officers and employees. After carefully considering the pleaded case of the plaintiff, it can only be concluded that the allegations of conspiracy (in the context of an alleged acting in concert to depress the share price of Liqua, which is essentially a case grounded on fraudulent conduct in the context of the securities laws) have not been properly taken in the plaintiff's pleadings. No full particulars have been given in the statement of claim such as to run counter to the express provisions of O. 18 r. 8(1) and (2) of the Rules of the High Court 1980. The defendant must specifically plead fraud and a general allegation is insufficient; full particulars must be pleaded. In this particular regard, I am in full agreement with the submission made by defendant's counsel when counsel cites the following passage in *Aik Ming (M) Sdn Bhd* as relevant:

> It cannot be gainsaid that procedural law is extremely strict in cases such as this. And rightly so. For a charge of conspiracy to defraud is a serious one to make. It ought not to be countenanced by a court unless properly taken in a party's pleadings. Such a charge must be supported by full particulars. The evidence led must be in proof of the pleaded case. The standard of proof where a conspiracy to defraud is alleged (as opposed to where, eg a conspiracy to induce the breach of a contract is alleged) is the same as where fraud is alleged. A Plaintiff must prove his case beyond a reasonable doubt. Imprudence is not and ought never to be equated with dishonesty. This, then, is the first rule.

The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in *Browne v. Dunn* [1893] 6 R 67 where Lord Herschell LC stated the principle in this way (at p. 70):

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. (at pp. 658 - 659 of the report)

[33] On the evidence, the plaintiff's allegation that the company had fictitiously created an element of exposure and thereby used this as a ground to suspend him, is not borne out. Similarly, the plaintiff has not proven that the defendant has through its directors and/or employees has breached any of the securities laws, exchanges rules, Rules of MCD and Rules of the Clearing House. There is no evidence of any person having been charged with any security offences arising from the facts of this dispute. Simply as a matter of evidence and the law, the pleaded case of

the plaintiff that the officers of the defendant "conspired and acted in concert, and in concert with others, during the … periods of suspension in order to manipulate … the share market for the benefit (and/or for the benefit of others acting in concert with them) so as to cause a sell down of Liqua shares, and … for achieving the objective the defendant's officers suspended the plaintiff (thereby shutting him out from two subsequent share transactions involving Liqua shares)", is not proven. These allegations are grounded on ss. 84, 85 and 87A of the Securities Industry Act 1983, all of which deal with offences having elements of fraudulent trading and the use of manipulative and deceptive devices. Where fraud is an ingredient, it requires no undue emphasis that the burden to be discharged is a higher burden of beyond reasonable doubt even in civil cases. The plaintiff has not succeeded in discharging this burden to succeed in its allegations based on these interlocking sections of the Securities Industry Act 1983.

[34] These allegations were also not addressed to DW6 (who is said to be implicated and the prime mover of this "conspiracy"). DW6 was not at all directly cross-examined on this, and to this extent the rule in *Browne v. Dunn* [1893] 6 R 67 HL must apply against the plaintiff.

[35] It is incumbent on the plaintiff to put his case to the defendant, but the nearest evidence of this I find only in the cross-examination of DW6 which put that Goh Bak Ming was pressured to do the married deals by DW6 at the meeting which took place at Nikko Hotel, a point which DW6 has strenuously denied. Such a putting of the plaintiff's case falls far short of the requirements of the rule in *Browne v. Dunn*. Although the plaintiff is not required to cross-examine on every point raised, he should cross-examine his opponent's witnesses on the very material and crucial parts of his pleaded case. Failure to do so will "will amount to an acceptance of the witness's testimony" (per Raja Azlan Shah J (as HRH then was) in *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212). DW6 has denied these serious allegations in his examination-in-chief.

[36] On this issue too, I must say I find Goh Bak Ming's (PW11's) testimony unreliable and incapable of belief. Here was the Managing Director of Align Matrix and a substantial shareholder of the company who was authorized to instruct the

defendant to do the married deals and yet, although the letters of instruction bore his signature, he could say in evidence, somewhat unconvincingly, that he did not know what he signed. He had to be subpoenaed to give evidence with some difficulty. He portrays himself as a reluctant witness who has not been fully truthful.

See pp. 79-84 in the ikatan dokumen plaintif (terpinda) for copies of these letters of instruction (exh. P5).

[37] I have also considered the evidence of the two experts called, namely Devaneson (PW7; retired Chief Market Operations Officer of Bursa Malaysia.) and Malakit Singh (DW2; an officer from Bursa Malaysia Depository Sdn Bhd). Mr Devaneson was not wholly familiar with the factual matrix of this case, and to that extent some of his replies have to read in context. He was equally guarded when questioned on the legality of the married deals and whether they involved a change in beneficial ownership. As for Malakit Singh, I am satisfied with his explanation that legally and technically the married deals involved a change in beneficial ownership. There is no actual evidence adduced by the plaintiff to suggest otherwise. The issue of no change in beneficial ownership is linked with the alleged breach of s. 84(2) of the Securities Industry Act 1983 by which a person "shall not, by means of purchases or sales of any securities that do not involve a change in beneficial ownership of those securities, or by any fictitious transactions or devices, maintain, inflate, depress or cause fluctuations in, the market price of any securities". The ingredients of this very serious offence which relate to "false trading and market rigging" are clear. There has been simply no evidence introduced by the plaintiff to support his claim of a breach of this section; in particular there is no evidence of the requisite mens rea, even assuming it can be deduced there was no change in beneficial ownership in the case of the married deals.

[38] As for the legality of the notices of suspension, I am satisfied on the evidence the plaintiff was in fact informed verbally on the 7th and 8th of October. Indeed the evidence indicated he had even appealed against the company's decision to impose the buying restrictions in the morning of the 7th. The plaintiff has argued for a rigid reading of cl. 16 on "notices" whereby, according to the plaintiff's argument, prior notice in writing must be given. I believe it is important to construe the contractual

provisions in context, and the context of this case relates to the customs and practices of the stockbroking industry, where dealings in shares are often done in an atmosphere of speed, volatility and at times high trading volume. In a volatile market, it is only to be expected that decisions have to be taken with immediacy since market movements on the stock exchange do not wait for neat decisions to be taken by stockbroking companies. The notice requirements of clause 16 have therefore to be read reasonably in its proper commercial context. Seen in its proper commercial context, the requirement of notice cannot be taken to mean a prior written notice in all circumstances. In the context of clause 12, seen earlier, ie, termination of the remisier's service, the SRA provides for a prior notice in writing of one month. On the facts of this dispute, such a notice was in fact given and no issue therefore turns on the notice requirement. No such express provision is provided in cl. 16. In relation to the restrictions on trading, so long as a remisier is given reasonable notice of any restrictions imposed on his trading, the decision taken by the stockbroking company should be taken as lawful under the contract. I agree with the position taken by the defendant that cl. 5.1.3 applies in this context. This particular provision comes under the general heading of "Duties And Obligations Of The Remisier", and the relevant cl. 5.1.3 reads:

> 5.1 The Remisier agrees and undertakes to the Company as follows:
>
> > 5.1.3 That he will comply with the company's requirements, directions, procedures, guidelines or any internal controls the Company may have in place from time to time or as imposed on the Company to regulate the conduct of the Remisier including (but not limited to) or any of the falling matters:
> >
> > > 5.1.3.1 The Company's discretion to place or to impose restrictions on the limit of transactions in securities dealt by or through the Remisier after prior reasonable notice has been given to the Remisier …

[39] In this context I have taken note of the earlier unamended provision of cl. 5.1.3.1 which reads:

> 5.1.3.1 The Company's absolute discretion to place or impose restrictions on the limit of transactions in securities dealt by or through the Remisier;

[40] On the evidence and the law therefore, the plaintiff's claim of unlawful suspension and termination on the absence of a prior written notice and without lawful justification, must stand dismissed. However, the contractual liabilities of the parties here do not simply depend on proof of unlawful suspension of trading or termination, or even on proof of any acting in concert or perceived conspiracy to manipulate the share market. The liabilities also depend on the proof of the losses suffered by the defendant company and the extent of the indemnity clause binding the remisier. On this, there is some evidence to suggest that on the probabilities of the case that the losses or the remaining shortfalls of the clients in relation to trading in Liqua shares may not have wholly arisen from or are in connection with transactions in securities "dealt by or through the remisier in the name of the company". On the contrary, and this is borne out by the investigation report, these Liqua losses might have arisen as well from errors, instructions and incorrect administrative procedures by the directors, officers and employees of the company. But the question to be asked in the full circumstances of the case, and on the pleaded case of the plaintiff, is whether these pieces of evidence are sufficient to prove the plaintiff's case on his pleading. With respect, the answer in my considered opinion has to be "no". It is not part of the court's judicial function to improve his pleading and to decide the case on unpleaded facts. The plaintiff's pleaded case rests on alleged irregularities and wrongdoings in relation to dealing in Liqua shares behind his back (ie, during the period he was suspended) and the alleged acting in concert, conspiracy and manipulation of the market to depress the share price of Liqua resulting in his losses. Nevertheless, the real point is the defendant is not claiming for any losses in relation to Liqua share trading from him. The Liqua losses have been settled and, as seen earlier, a large amount also written off. The shortfalls now being claimed against him are for non-Liqua transactions. Exhibit D87 shows the shortfalls remaining on the margin and non-margin accounts as at 1 August 2011. The current figures as at 1 August 2011 are a total of RM8,663,022.81 for losses under the margin accounts and RM478,895.36 for losses under the non-margin accounts.

[41] The Liqua losses have become strictly irrelevant on the present facts. To this extent therefore, the defendant's counterclaim is borne out, such that the plaintiff's claim to be absolved from liability from the indemnity provision must be dismissed. The defendant has proven that it has taken all reasonable steps and within a reasonable time under cl. 8.1.6 of the SRA to recover from the clients, and the shortfalls now being claimed are far less that the amounts originally demanded. The defendant can set off the plaintiff's security deposit and his commissions against the losses. As at March 2012, the security deposit and retention fund/interest stand at RM2,012,153.37 (RM1,867,980 + RM144,173.37). The sum is presently kept in a special account as required under the SRA.

[42] As for the other claims by the plaintiff, the claim for libel/defamation must fail on the pleadings. There has been no compliance with the requirements of O. 78 of the Rules of the High Court. The claims for exemplary damages and loss of earnings and consequential losses depend on the validity of the termination and upon proof of the losses by evidence. On the facts and the law, the termination was effected properly under the SRA and in accordance with the notice requirement. No evidence has been led in any event on the consequential losses suffered by the plaintiff. No credible evidence has also been established to support his claim for alleged overdue commissions earned under a special incentive scheme. DW6 has stated that the plaintiff was not entitled to these sums. The only direct documentary evidence to establish this entitlement is a self-serving letter written by the plaintiff which has not been confirmed in writing by the defendant. See exh. P-76 (letter from defendant dated 1 November 2004 to Head, Remisiers Affair Department.

Conclusion And Order

[43] The plaintiff's claim is therefore dismissed with costs to be taxed. The defendant's counterclaim for the remaining shortfalls under the margin and non-margin accounts in prayer (1)(A) and (B), prayers (2), (3), (4), and (6) is allowed with costs to be taxed.

Judgment is to be entered accordingly.

A It is necessary to add that the judgment given is on sums as pleaded, which will invariably vary overtime and will be dependent as well on the outcome of the on-going recovery process against the clients. The actual sums owing will require to be adjusted accordingly at the stage of execution.

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